


COMMISSION DIRECTIVE


ADMINISTRATIVE MATTERS ☐DATE April 24, 2008MOTOR CARRIER MATTERS ☐DOCKET NO. 2007-440-EUTILITIES MATTERS ☒

SUBJECT:

DOCKET NO. 2007-440-E – Application of Duke Energy Carolinas, LLC for Approval of Decision to Incur Nuclear Generation Pre-Construction Costs for the Lee Nuclear Station in Cherokee County – Discuss with the Commission the Motions for Protective Order Filed on Behalf of Duke Energy Carolinas, LLC, Westinghouse Electric Company, LLC and Stone and Webster, Incorporated, the Motion to Compel Discovery from Duke Energy Carolinas, LLC along with a Response by Friends of the Earth to Motions for Protective Order by Duke and Westinghouse Filed by Robert Guild, Esquire, on Behalf of Friends of the Earth.

COMMISSION ACTION:

I want to commend the parties in this case for their excellent oral arguments on these discovery matters.

While I admire the fine lawyering displayed at oral arguments on these issues, I want to make clear that the parties must move further toward resolution of these discovery disputes, since we must issue a decision on the merits in this case within a very short, statutorily-imposed time frame. In order for this case to be decided, each party must have access to the necessary evidence to make its case. In light of the time constraints imposed on this docket by statute, it is critical that the parties cooperate to facilitate timely conclusion of the case.

With that being said, I have prepared and distributed a detailed written motion as to how the Commission should deal with the discovery matters currently before us. As for any remaining discovery matters, I move that we appoint as Hearing Officer Randall Dong, and that he be authorized to decide any future discovery issues. Due to the length and complexity of the motion, I do not think it is useful for it to be read orally. Rather, I move that it be recorded as written.

(See Attached Motion)

PRESIDING Hamilton

Session: Special

MOTION YES NO OTHER

Time of Session 2:30 PM

CLYBURN	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
FLEMING	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
HAMILTON	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
HOWARD	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
MITCHELL	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
MOSELEY	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
WRIGHT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Absent

APPROVED _____
 APPROVED STC 30 DAYS _____
 ACCEPTED FOR FILING _____
 DENIED _____
 AMENDED _____
 TRANSFERRED _____
 SUSPENDED _____
 CANCELED _____
 SET FOR HEARING _____
 ADVISED _____
 CARRIED OVER _____
 RECORDED BY Schmieding

Commissioner Wright was on Sick Leave

Docket No. 2007-440-E
Attachment to Motion for Special Meeting
April 24, 2008

During the course of discovery in Docket No. 2007-440-E, on or about April 7, 2008, Duke Energy Carolinas, Inc. ("Duke") moved for a protective order which would allow it to produce certain cost data and related information in its possession subject to a confidentiality agreement, and which would allow it to completely withhold from disclosure other materials which are covered by confidentiality agreements between Duke and certain third parties. A consortium comprised of Westinghouse Electric Company, LLC and Stone & Webster, Inc. ("Westinghouse/Stone") and the Southern Company ("Southern") have each objected to Duke's release of documents covered by their respective confidentiality agreements. The Westinghouse/Stone consortium also filed its motion for a protective order blocking the release of documents it prepared in the course of its dealings with Duke on April 7, 2008. Southern has not entered an appearance in this matter.

On or about April 14, 2008, the Friends of the Earth ("FOE") moved to compel discovery of information it sought in Requests to Produce No. 3, 4, 5, 6, 7, 8, 9, 11, 12, and 13, which were served upon Duke by FOE on March 13, 2008 and responded to by Duke on April 7, 2008. Duke's responses are summarized below:

- 1) Request No. 3 sought "[a]ll documents related to the cost of the proposed plant and necessary land and support facilities.
Request No. 4 sought "[a]ll documents related to the anticipated pre-construction costs of the proposed plant."
Request No. 5 sought [a]ll documents related to the cost of the Westinghouse AP 1000 power reactor proposed to be constructed at the plant."
Request No. 8 sought "[a]ll documents related to the estimated costs of the Westinghouse AP 1000 power reactor to be constructed by any other utility."
Request No. 12 sought "[a]ll documents related to the prudence of the decision to incur the preconstruction costs related to the proposed plant including the information known to Duke which is the basis for the decision to incur such costs."

Rule 13 sought [a]ll documents related to the projected or estimated cost of electricity...expected to be generated by the proposed plant over its lifetime.”

Duke responded to Requests No. 3, 4, 5, 8, 12, and 13 with identical objections and refusals to produce responsive documents on the basis that the requests were “overbroad, unduly burdensome, and [sought] documents which contain highly sensitive, proprietary, commercially valuable trade secret information.”

- 2) Duke posed various objections to Requests 6 and 7, which sought information relating to funding sought or obtained from the U.S. Department of Energy, but responded that USDOE has not solicited applications for funding, and that Duke has not applied for USDOE funding.
- 3) Duke objected to Request No. 9, which sought documents relating to the withdrawal from joint or shared ownership of the proposed plant by the Southern Company or others, on the basis that the request was overbroad, unduly burdensome, and sought information protected by the attorney/client privilege, but produced a one-page document in response.
- 4) In response to Request No. 11, which requested documents pertaining to costs and availability of alternatives to the proposed nuclear plant considered by Duke for supplying its generation needs, Duke asserted the same objections it had asserted in response to Requests No. 3, 4, 5, 8, 12, and 13, but provided a list of source documentation supporting the supply side resources evaluated in Duke’s 2007 Annual Plan quantitative analysis, as well as a minimally redacted copy of that plan totalling 148 pages.

At the hearing, Duke proposed that we issue an order declaring confidential all of the documents which would be responsive to FOE’s requests to produce, allowing Duke to produce under a protective order all documents except those whose production was objected to by Westinghouse/Stone and Southern, reserving for FOE the right to subsequently challenge the confidentiality of specific documents it wished to make public and to seek relief from the protective order for those documents. While FOE and Duke may have resolved their discovery disputes by voluntarily agreeing to an arrangement similar to this approach, FOE refused to sign a confidentiality agreement. Without FOE’s agreement to such a

process, we must resolve this dispute under the applicable rules of evidence and procedure.

Included with Duke's motion for protective order is the affidavit of Duke's Group Executive and Chief Nuclear Officer Dhiaa M. Jamil. Referenced in Jamil's affidavit as Exhibit A (the "Jamil Exhibit") is a "list" of groups of materials characterized collectively by Duke as "confidential cost estimates and related documents" for which Duke seeks a protective order. Duke inadvertently omitted the exhibit from its initial filing of the motion for protective order, but filed it and served it on the parties this morning. However, a review of this list reveals it to be little more than a restatement of FOE's requests for production.

The first entry listed in the Jamil Exhibit seeks protection for all documents sought in FOE's Request No. 3. The second entry seeks protection for all documents sought in FOE's Request No. 4. The third entry seeks protection for the Price Book and Transmittal Letter prepared by Westinghouse/Stone, which were sought in FOE's Request No. 5. The fourth entry seeks protection for materials relating to the Southern Company's withdrawal from the project, which FOE sought in Request No. 9. Entries 5 and 6 seek protection for documents pertaining to alternatives to nuclear power generation and renewable bids. FOE sought production of these materials in Request No. 11. Entry 7 seeks protection of the redacted portions of the documents produced by Duke in response to Request No. 11. While entries 3, 4, and 7 of the Jamil Exhibit identify specific materials for which Duke seeks protection, entries 1, 2, 5, and 6 do not give the parties or the Commission adequate guidance to determine which documents within those broadly-drawn parameters are confidential or otherwise entitled to protection from public disclosure.

While facially broad, FOE's production requests appear at the outset to be reasonably calculated to lead to the discovery of admissible evidence pertinent to the Commission's review of Duke's project development application pursuant to Section 58-33-225(C) of the Base Load Review Act, or to the question of whether "the decision to incur preconstruction costs for the plant is prudent" pursuant to Section 58-33-225(D) of the Base Load Review Act.

While there is little doubt that a complete production of responsive documents could be voluminous, duplicative, and expensive to produce, Duke has refused to produce any responsive documents to Requests No. 3, 4, 5, 12, and 13 absent a blanket preliminary stipulation of confidentiality from FOE. Given that FOE has refused to enter into such an agreement, a more useful response to these

requests at this stage of discovery would identify and describe the documents which would be responsive to the requests with sufficient particularity in order for the Commission to make a determination as to whether the documents are truly confidential and whether Duke's objections of overbreadth and undue burden are valid. Where Duke claims overbreadth, the company should suggest a narrower scope of production which might provide FOE the information to which it is entitled without imposing an undue burden upon Duke. Similarly, Duke's responses to Requests No. 9 and 11 do not provide the Commission with enough detail to determine whether the responsive information would be protected by the attorney-client privilege. While Duke and the Westinghouse/Stone consortium relied upon the South Carolina Trade Secrets Act to support their withholding of certain documents, that law is inapplicable to this dispute. South Carolina Code Section 39-8-110(C) provides that the Trade Secrets Act applies only to actions seeking civil remedies for misappropriation of trade secrets.

Therefore, for each responsive document or group of documents or other things responsive to Requests No. 3, 4, 5, 8, 12, and 13, we direct Duke to describe the nature of the documents, communications, or other things which it has withheld from production in a manner that, without revealing the information for which Duke asserts protection, will enable the parties and this Commission to assess whether the subject matter is confidential, commercially sensitive, or trade secret information as a matter of law. The Commission is aware of FOE's position that it will not even inspect any materials produced under a protective order imposed by this Commission. It has every right to take this position. However, while Friends of the Earth has every right to refuse to enter into a confidentiality agreement, its refusal will not enhance its position in the discovery process, and Friends of the Earth will not gain access to documents that deserve such protection without agreeing to keep them confidential.

Also, if Duke considers any requests to be overbroad or unduly burdensome, it should state the reasons it considers them to be so, and if possible, provide responsive documents which it reasonably believes would provide the information being sought without overbreadth or undue burden.

Duke will have seven (7) days from its receipt of our Order in this matter to accomplish this task. Once this information is filed and served, we urge the parties to act quickly to resolve any remaining disagreements or to bring any remaining issues to the Commission so they may be ruled upon expeditiously.

Based on the arguments heard by the Commission and the affidavits of Duke's Group Executive and Chief Nuclear Officer Dhiaa M. Jamil, Westinghouse's Vice President of Customer Project Development Randolph D. Galm, and Stone & Webster's Vice President Edward J. Hubner, we believe the Price Book and Transmittal Letter prepared by Westinghouse/Stone are confidential and commercially sensitive in nature, and that their disclosure could jeopardize Duke's bargaining in contractual negotiations, possibly driving up the costs of a power plant, and potentially passing increased costs on to consumers. FOE stated that it seeks production of these documents in order to ascertain the ultimate cost of a plant project. If produced, they would be subject to a confidentiality order. However, because it is possible that the other information Duke will provide in response to FOE's requests may provide FOE with the data it needs to present its case without necessitating the disclosure of the Westinghouse/Stone materials, I move that we hold in abeyance FOE's motion to compel production to the extent that it seeks these documents, and that we likewise hold in abeyance the motions for protective order filed by Duke and Westinghouse/Stone, to the extent that the motions seek protection of these documents.

We have not been presented with any information or arguments that would lead us to conclude that the disclosure of the Withdrawal Agreement entered into by the Southern Company and sought by FOE in Request No. 9 would present the same potential dangers as disclosure of the Westinghouse/Stone materials. Furthermore, Southern has not entered an appearance to oppose the disclosure of the Withdrawal Agreement or sought its own protective order. I therefore move that we order Duke to produce the Withdrawal Agreement to FOE.

With regard to the portions of Duke's 2007 Annual Plan which had been redacted from the documents produced in response to Request No. 11, I move that we order Duke make this information available to FOE under a protective order, which will provide that the information cannot be copied or disclosed to any persons other than FOE's counsel and expert witnesses, and that the materials produced under the protective order must be returned to Duke at the conclusion of this case.

I further move that we appoint Randall Dong as the Hearing Officer in this case, and that we give him full authority to rule on future discovery disputes in this Docket and to impose any protective orders he deems necessary and proper pursuant to S.C.R.C.P. 26(c).